No. 45788-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TOMMY MONTENGUISE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik Price, Judge
Cause No. 13-1-00992-1

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Whether the trial court's decision to require the defendant to wear a physical restraint during trial was a violation of the right to a fair trial guaranteed by Washington Constitution, art. 1§ 3, and the United States Constitution.

B. STATEMENT OF THE CASE.

The State accepts Montenguise's statement of the case.

C. ARGUMENT.

The trial court acted within its discretion when it ordered Montenguise to wear a leg brace during trial. Even if it were error, it was harmless.

Montenguise argues that his right to a fair trial was violated when the court ordered him to wear a leg brace under his clothing during trial. The trial court properly considered the required factors before ordering that the defendant wear restraints. Even if this court finds that the defendant was improperly required to wear a leg brace, which the State does not concede, the decision is subject to a harmless error analysis.

1. The facts.

Before the jury entered the courtroom, the judge and counsel conducted a colloquy regarding the use of a restraining device on the defendant for trial. RP 24-37.[1]

[1] All references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated December 16 and 17, 2014.

The leg brace was placed on the defendant's left leg and underneath both his sock and his pants. RP 24-25, 34. The prosecutor listed a variety of reasons for needing to use the leg brace on the defendant.

> THE PROSECUTOR: [T]he State's position on this is, due to the limited resources of jail facility, there is only one corrections officer present, which would make it very difficulty (sic) in a situation where there was not a restraint on the defendant.
>
> They don't have the ability to be close to the defendant the way we have it laid out for understandable reasons. The Court does not want an armed, uniformed guard standing right behind a defendant during trial, but that also factors into the safety and the issues in the courtroom, the distance that the officer would have to travel. I would also add that this is a domestic violence case. Those, by their very nature, are inherently more unpredictable and potentially dangerous than perhaps an embezzlement case, a bank fraud case, something of that nature.
>
> Finally, we have a situation where this individual, if convicted as charged, is looking at a standard range of 33 to 43 months in prison. An extended sentence like that is always a concern to the State of someone's willingness to flee, given the opportunity

RP 26.

After hearing an objection from defense counsel, the court permitted the restraint based on several factors.

> THE COURT: This is a new issue for the Court to balance the competing interests in this case, and I'm not going to tell - - I'm not going to say that my

> thinking on this will not evolve over time, but at this point, I'm going to permit the use of the restraint on Mr. Montenguise for the following reasons: The potential for the jury to observe the brace is limited; the brace is covered by his pant completely and covered by his sock; he is sitting on the far side of counsel from the jury box; and any restriction on his gait can be mitigated by excusing the jury, if Montenguise is going to take the stand; this is a domestic violence case; there is the potential for security issues when we have a protected party in the courtroom there hasn't been - - I want to make this clear - - there has been no showing that Mr. Montenguise personally has exhibited any violence or disruptiveness. His appearance before the court this morning has been exemplary, but, nevertheless, it is clear that corrections is thinly staffed, and we have not quick ability to staff many corrections officers within the courtroom to prevent any potential issues.
>
> So I don't want to belabor this, but I'm finding that the use of the restraint is the least restrictive ability to assure safety in the courtroom, given the size of the courtroom we have and given the ability to mitigate the potential consequences to notifying the jury that it's being used.

RP 35-37.

2. The law.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002). Restraints are disfavored because

they may impact the constitutional right to the presumption of innocence, State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one's own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring safety and order in the courtroom. State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (citing to State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981).

A trial court has broad discretion to provide security and ensure decorum in the courtroom. Damon, 144 Wn.2d at 691. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. Id. at 691-92.

In State v. Flieger, 91 Wn. App. 236, 955 P.2d 872 (1998), the court found a legitimate distinction between a shock box which does not restrain physical movement and cannot be seen by jurors

from other restraint methods which are visible. In that case the distinction did not matter because the shock box worn by the defendant had actually been noticed by the jurors. Id. at 242.

Errors which infringe on a defendant's constitutional rights are presumed prejudicial on direct appeal. Flieger, 91 Wn. App. at 243. Like other constitutional errors, a claim of unconstitutional shackling is subject to a harmless error analysis. Jennings, 111 Wn. App. at 61. The State bears the burden, on direct appeal, of showing that the shackling did not influence the jury's verdict. Damon, 144 Wn.2d at 692.[2] "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The court in Hutchinson, a direct appeal, found that because the jury never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. Hutchinson, 135

[2] In Hutchinson, 135 Wn.2d at 888, the court said that the defendant must show that the shackling influenced the jury's verdict. Because the jury in that case never saw the defendant in shackles, he could not show prejudice.

Wn.2d at 888. Similarly, the court in Jennings held that the stun belt the defendant was wearing was not visible to the jury and the error was harmless. Jennings, 111 Wn. App. at 61. The court in Damon found that the jury must have observed the restraint chair in which the defendant was seated, and therefore the error was not harmless. Damon, 144 Wn.2d at 693.

3. Argument.

Montenguise claims that he suffered prejudice because he was required to wear a non-visible restraint during trial. Contrary to Montenguise's argument, the court properly considered the factors necessary to require the defendant to wear a restraining device. In addition, the record provides no reason to believe that the jury saw the restraint and therefore no reason to believe it would be prejudiced against him because of it.

The law requires that a judge carefully on the record consider a long list of factors before requiring a defendant to wear a restraining device. Those factors as discussed above include dangerousness, risk of escape, threat, courtroom security, and alternative methods. Hutchinson, 135 Wn.2d at 887-88. Every single one of those categories is indicated on the record. The court noted that the defendant did not appear dangerous and that his

attitude up to that point had been exemplary. RP 36. On the other hand, the court was aware of the defendant's history of violating court orders. RP 35. The court noted that there was no indication that Montenguise was a threat to escape, but if he did attempt to escape, there was only one corrections officer available and no ability to quickly obtain more. RP 36. The factor of courtroom security was a continuing major influence to the judge's decision. RP 37. The judge noted that the courtroom was small, the defendant was sitting in close proximity to the jury while at the defendant's table, and the witness stand was also close to the jury box. RP 35. To exacerbate the security issue, as noted by the prosecutor, the corrections officer was not able to stand close to the defendant because of the courtroom configuration. RP 26. The judge further noted that the potential for the jury to see the restraint was limited. RP 36. The device was completely covered by his pants and sock. RP 36. When sitting at the defendant table, his left leg was blocked by the table as well as his counsel, and if he were to take the stand his left leg would be the one farther away from the jury. RP 32, 36. Additionally, restrictions to his gait would be mitigated by excusing the jury while he moved about the courtroom. RP 36. The final factor of determining alternative methods was also

discussed by the judge when he stated this is "the least restrictive ability to assure safety in the courtroom, given the size ... and ... the ability to mitigate the potential consequences of notifying the jury that it's being used." RP 36-37.

Montenguise quotes State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), and Hartzog, to claim that "a careful review of the record reveals that the trial court's decision to grant the State's request to restrain the defendant was not based upon 'specific facts relating to the individual' that were 'founded upon a factual basis set forth in the record.'" Petitioners Opening Brief at 10-11. In Finch, the defendant was on trial for two counts of aggravated murder, second degree assault, and unlawful imprisonment. The State sought, and the jury imposed, the death penalty. Finch, 137 Wn.2d at 804. During the entire trial and sentencing proceeding, Finch was shackled and, during the testimony of two of the witnesses, handcuffed to his chair. Id. at 850-51. The court in Finch, then, was addressing a situation where the restraints were extremely restrictive and, at least part of the time, visible to the jury, Id. at 854-55, 857-58, not a leg brace that was invisible to the jury, and that should be taken into account when applying the holding of Finch to this case. In addition, the Finch court, although

recognizing that some restraints may have been necessary during the testimony of one witness, found that that the trial court had failed to consider any less restrictive alternatives to the shackles and handcuffs. Id. at 853-54.

Here, preventing injury was the predominate reason the court required the restraint. The courtroom was small, and the defendant would be closer to the jury than the corrections officer was to the defendant. RP 35-36. Additionally the judge noted that domestic violence cases had the potential to pose security issues when the protected party was in the courtroom, as well as the defendant's history of disobeying court orders. RP 36.

Montenguise claims that the trial judge failed to follow the precedent set in Finch and Hartzog, yet neither case indicates those courts would have ruled any differently for Monteguise. In Finch the trial court's reasoning for requiring the defendant to wear restraints was "confusing, inconsistent with its earlier observations, and does not support its conclusion." Finch, 137 Wash.2d at 857. Further it was determined that the jury could observe the restraints Finch was wearing. Id. at 858. This was not the case in Montenguise's trial; the judge's reasoning was clearly thought out, and there is no indication that the jury could tell Montenguise was

wearing a restraint. Nothing about the holding of Hartzog indicates that the trial court in this case abused its broad discretion to provide order in the courtroom. Hartzog, quoting from State v. Tolley, 290 N.C. 349, 368, 226 S.E.2d 353 (1976), lists many factors which the trial court may consider, one of which is "the nature and physical security of the courtroom." Hartzog, 96 Wash.2d 400. In Montenguise's trial, the small size of the courtroom with no place for the corrections officer to stand close to the defendant was a factor relied upon by the judge.

According to Montenguise "the record is clear" as to why the use of restraints were required, and those are insufficient. The record is in fact clear, and when looked at in its totality, reflects a properly thought out decision by the court. Montenguise emphasized two portions of the court's decision that indicate that he displayed no threat to escape, and that he had good behavior in the courtroom. Appellant's Opening Brief at 11-12. However, the court also took into account other areas of concern which weighed toward using restraints.

> THE COURT: It is also relevant to the Court that Mr. Montenguise has a criminal history that includes violation of court orders and malicious mischief as recently as last year.

....

> THE COURT: We have a small courtroom, and the courtroom has the jury sitting in close proximity to the defendant's table, as well as the witness stand is in close proximity to the jury box.

RP 34-35.

Montenguise must establish that the judge's decision was manifestly unreasonable or rests on untenable grounds. State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). While the record does reflect that Montenguise did not appear to be a risk to escape and that his behavior had been exemplary, the decision by the judge was based on tenable grounds. The safety of the courtroom was a legitimate concern for the judge and does not constitute a manifestly unreasonable ground. The record provides context for the factors on which the judge based his decision, and none of them suggest that the court's decision was manifestly unreasonable.

4. Assuming *arguendo* that the court erred, the error was harmless.

Even if the court's ruling was error, which the State does not concede, Montenguise still must show that he was prejudiced. Jennings, 111 Wn. App. at 61. Unless there was prejudice, the error was harmless. To establish harmless error the State must

show that "any reasonable jury would have reached the same result in absence of error." Gulroy, 104 Wn.2d at 425. In Hutchinson, the court found that because the jury never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. Hutchinson, 135 Wn.2d at 888. Even in Finch, the court found harmless error. Finch, 137 Wn.2d at 862. While Montenguise implies, without argument or citation to the record, that the jury saw the physical restrictions, nothing in the record suggests that the jury noticed them.

Montenguise would be in a similar position to the defendant in Jennings, where the error was also found to be harmless. Jennings, 111 Wn. App. at 61. In Jennings it was determined that the stun belt he wore was not visible to the jury and therefore there was no possibility of prejudice. Id. There is no factual backing to support the idea the jury was aware of a device that restricts gait when Montenguise was not seen walking. If the jury does not see a restraint, then Montenguise could not have been prejudiced by simply wearing a restraint.

Additionally, even had the device been seen by the jury, there was overwhelming evidence to establish that any reasonable jury would have returned the same guilty verdict. The evidence

against Montenguise was great. The officers involved in Montenguise's arrest provided testimony more credible than that of Montenguise's romantic partner, Anita Vela.

At trial Vela testified that she was just going in to Montenguise's house to grab some items and leave, thereby not violating the no contact order. This is contradicted by the testimony of Community Corrections Officer Matt Frank, who testified that Vela was lying in the bed when they entered to inspect the premises. RP 118. Deputy Jay Swanson also testified that when Montenguise was arrested, Vela and Montenguise separately told him that they were living together for two days prior to Montenguise's arrest. RP 141, 143-44. Swanson further testified that Vela never once mentioned that she had snuck into the trailer; it was only later that she first mentioned that. RP 142. Testimony also shows that Montenguise never indicated when he was arrested that he was surprised that Vela was in the house, as would have been expected if Vela actually had snuck into the house without his knowledge. RP 157. Additionally Montenguise and Vela claimed that Vela would only stay at the house when Montenguise would go down to Portland for work, but Montenguise's Community Corrections Officer testified that

Montenguise does not go to Portland often and that his travel permits do not suggest he was in Portland during the times he claimed. RP 217-19.

Montenguise claims that there were not overwhelming facts to establish guilt because Vela testified that she snuck in to Montenguise's residence without his notice. However, Vela also testified she did not want to hurt Montenguise, RP 89, 256-57, and other aspects of her story were discredited by the officers involved in the arrest. The jury must have found Vela to be a less credible witness than the community corrections officers and the deputy.

Even if Montnguise had not been wearing any kind of restraints the outcome of the trial would have been the same.

D. CONCLUSION.

Montenguise has failed to show that either the judge erred or that he was in any manner prejudiced by wearing a physical restraint. For the reasons argued above, the State respectfully asks this court to affirm his convictions.

Respectfully submitted this 12th day of August, 2014.

Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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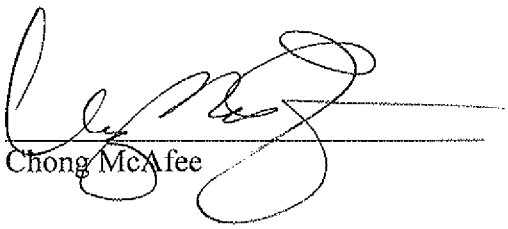
--AND--

TOMMY MONTENGUISE #358522
WASH. STATE CORRECTIONS CENTER
PO BOX 900
SHELTON, WA 98502

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of August, 2014, at Olympia, Washington.



Chong McAfee

THURSTON COUNTY PROSECUTOR

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